Supreme Court, U.S.
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No. 92-1024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RONALD E. SEXTON, *et al.*,
Petitioners,

v.

MICHAEL P. VAUGHN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer waives a laches defense to a multiemployer pension plan's withdrawal liability claim in the plan's collection action by the employer's failure to request arbitration as mandated by 29 U.S.C. § 1401(a)(1)?

PARTIES TO THE PROCEEDING

Respondents, who were plaintiffs before the United States District Court for the Western District of Missouri and appellees before the United States Court of Appeals for the Eighth Circuit, are Michael P. Vaughn, Cindi S. Nance, Michael Craig, Lynn Nutt, W.W. Walderbach, Lawrence S. Jenkins, Patricia Scott and James G. Sheehan, in their capacities as present trustees of the Meatcutters Local 576 and Employers Kansas and Missouri Pension Plan.

Petitioners, who were defendants before the United States District Court for the Western District of Missouri and appellants before the United States Court of Appeals for the Eighth Circuit, are Ronald E. Sexton, individually and in his representative capacities as statutory trustee of Franklin Investment Group, Ltd., SLC of North America, Inc., Kalco, Inc., Kalco-Illinois, Inc., Jacpad Corporate Financial Services, Inc., Barclays Leasing Ltd., Commonwealth Leasing Corporation, and Congressional Insurance Agency Inc., and in his representative capacity as trustee of Sexton Family Trust.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
A. Background	3
B. Proceedings Below	5
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THIS PRECISE ISSUE; THE CASES RELIED ON BY PETITIONERS ARE DISTINGUISHABLE	6
II. THE NARROW ISSUE PRESENTED IS NOT OF THE IMPORT WHICH WARRANTS EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION	9
III. THIS ISSUE IS PREMATURE FOR REVIEW; DISCRETIONARY REVIEW SHOULD BE DEFERRED FOR FURTHER LOWER COURT DEVELOPMENTS REGARDING THIS ISSUE AND WAIVER IN GENERAL	10
IV. THE RESULT BELOW IS ACCURATE AND FAIR, THEREBY MAKING EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION UNWARRANTED	10

TABLE OF CONTENTS—Continued

Page

V. ANY OTHER RESULT WOULD LEAD TO CONFUSION, CHAOS AND UNNEEDED EXPENSE FOR ALREADY FINANCIALLY BURDENED MULTIEMPLOYER PENSION PLANS TO THE ULTIMATE DETRIMENT OF THE PENSION RECIPIENTS ERISA WAS INTENDED TO PROTECT 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases	Page
Central States Southeast and Southwest Areas Pension Fund v. MGS Transportation, Inc., 661 F. Supp. 54 (N.D. Ill. 1987)	11
Central States Southeast and Southwest Areas Pension Fund v. Sztanyo Trust, 693 F. Supp. 531 (E.D. Mich. 1988)	12
Connolly v. Pension Benefit Guaranty Corp., 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979)	12
Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund, 787 F.2d 897 (3rd Cir. 1986)	7, 10
Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241 (3rd Cir. 1987)	10
I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415 (D.C. Cir. 1987)	6, 12, 13
I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Industries, 727 F.2d 1204 (D.C. Cir. 1984)	7
ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc., 846 F.2d 879 (2nd Cir. 1988)	12
ILGWU Nat'l Retirement Fund v. Smart Modes of California, Inc., 735 F. Supp. 103 (S.D.N.Y. 1990)	9
In re Centric Corp., 901 F.2d 1514 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 145 (1990)	7, 8, 11
In re Korman Corp. and Teamsters Pension Fund of Philadelphia, 10 EBC 1608 (Pereles, Arb., Aug. 15, 1988)	11
Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989)	9
Mason & Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund, 852 F.2d 156 (6th Cir. 1988)	7
Park South Hotel Corp. v. New York Hotel Trades Council, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966 (1988)	7
Retirement Fund of Fur Mfg. Ind. v. Getto & Getto, Inc., 714 F. Supp. 651 (S.D.N.Y. 1989)	11

TABLE OF AUTHORITIES—Continued

	Page
Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054 (7th Cir. 1988)	6
Robbins v. Chipman Trucking, Inc., 693 F. Supp. 628 (N.D. Ill. 1986), *aff'd*, 866 F.2d 899 (7th Cir. 1988)	8
Teamsters Pension Trust Fund v. Allyn Transportation Co., 832 F.2d 502 (9th Cir. 1987)	6
Vaughn v. Sexton, 975 F.2d 598 (8th Cir. 1992)	1
Statutes	
Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1001 *et seq.*	3
29 U.S.C. § 1301(b)(1)	4
29 U.S.C. § 1381(a)	3
29 U.S.C. § 1381(b)(1)	3
29 U.S.C. § 1383(a)(1)	4
29 U.S.C. § 1383(e)	4
29 U.S.C. § 1391	4
29 U.S.C. § 1399(a)	4
29 U.S.C. § 1399(b)(1)	2, 6, 8, 9
29 U.S.C. § 1399(b)(2)(A)	2, 4, 6
29 U.S.C. § 1399(c)(5)	4
29 U.S.C. § 1401(a)(1)	i, *passim*
29 U.S.C. § 1401(b)(1)	3, 5, 6, 13

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BRIEF IN OPPOSITION

The respondent trustees of the Meatcutters Local 576 and Employers Kansas and Missouri Pension Plan respectfully pray that the Court deny the Petition for Writ of Certiorari ("Petition" or "Pet.") to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 14, 1992, as, *inter alia*, no conflict exists between the Circuit Courts of Appeal on the issue presented.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit which is the subject of the Petition is reported at *Vaughn v. Sexton*, 975 F.2d 598 (8th Cir. 1992), and appears reprinted in the Peti-

tion at page A1 of the Appendix A thereto ("Pet. App. A").

The multiple orders comprising the decision of the United States District Court for the Western District of Missouri (Wright, D.J.), from which petitioners appealed to the Eighth Circuit Court of Appeals, have not been reported. With the exclusion of one order, all other orders comprising that decision are reprinted in the Petition at page A20 of the Appendix A thereto. The omitted order is reprinted in Appendix A hereto ("Res. App. A") at page 1a.

JURISDICTION

Respondents adopt the jurisdictional statement of petitioners found at page 2 of the Petition.

STATUTES INVOLVED IN THE CASE

29 U.S.C. § 1399(b)(1) provides as follows:

> As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—
>
> (A) notify the employer of—
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments, and
>
> (B) demand payment in accordance with the schedule.

29 U.S.C. § 1399(b)(2)(A) provides as follows:

> No later than 90 days after the employer receives the notice described in paragraph (1), the employer—
>
> (i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,
>
> (ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allowable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

29 U.S.C. § 1401(a)(1) provides in pertinent part:

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration . . . .

29 U.S.C. § 1401(b)(1) provides as follows:

> If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399 (b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

STATEMENT OF THE CASE

A. Background

When Sexton's company SLC bought the stock of Williams Meat in April 1984, the meatcutters had an ongoing collective bargaining agreement which obligated Williams Meat to make contributions to the multiemployer pension plan represented by respondent trustees. Pet. App. A2-3. Contract negotiations followed, but broke down in the midst of a Teamster strike in which meatcutters honored the Teamster picket line. The meatcutters' contract expired in August 1984, thereby triggering "withdrawal liability", or an obligation on the part of the withdrawing employer to pay its proportionate share of the unfunded vested benefits of the pension plan in an amount statutorily determined in accordance with the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1001 *et seq.* Pet. App. A3. *See* 29 U.S.C. §§ 1381(a) and (b)(1),

1383(a)(1) and (e), and 1391. (Hereinafter, all citations to statutes are to 29 U.S.C. unless otherwise noted.)

In early 1987, Williams Meat filed for bankruptcy under Chapter 11, later converted to Chapter 7. In January 1988, the respondent pension plan trustees filed a proof of claim for withdrawal liability in the Williams Meat bankruptcy. Pet. App. A3.

After correspondence seeking information covering identity and existence of "control group" members, in June 1988, the respondent trustees sent additional and separate notice of and demand for withdrawal liability payment to Sexton in his capacities as representative of SLC and Franklin Investment Group, related entities deemed by the MPPAA to be one and the same employer for purposes of withdrawal liability notice and payment. Pet. 5; Pet. App. A3-4, A9 (and cases cited therein); Appellants' Appendix filed in the Eighth Circuit ("At. App.") 113, 115; Appellees' Appendix filed in the Eighth Circuit ("Ae. App.") 70. *See* §§ 1301(b)(1) and 1399(a). Likewise, in August 1988, the respondent trustees notified Sexton in his capacity as representative of SLC and Franklin Investment that a default on the amount of the withdrawal liability assessed would occur 60 days after receipt of the notice if withdrawal liability payments were not made. Pet. 5; Pet. App. A23. *See* § 1399(c)(5). Although correspondence was received by the Plan in which liability was denied, none of the petitioners receiving actual or constructive notice of the withdrawal liability, or notice of default in payment thereof, requested a review of the withdrawal liability assessment or timely requested arbitration of any dispute concerning that liability assessment. Pet. 5; Pet. App. A4, A23-24; Ae. App. 70. *See* §§ 1399(b)(2)(a) and 1401(a)(1).

B. Proceedings Below

In March 1989, the respondent pension plan trustees sued to collect the now "due and owing" withdrawal liability (*see* § 1401(b)(1)) from SLC and Franklin Investment and from Sexton individually and in his representative capacity as trustee of the Sexton Family Trust, a revocable trust of which Sexton was grantor, trustee and a beneficiary. Later, other related corporate entities were added to the trustees' lawsuit. Pet. App. A4. In various orders and ultimately via summary judgment, the District Court held, *inter alia*, that petitioners had waived their laches defense to respondents' claim of withdrawal liability by petitioners' failure to request arbitration as required by § 1401(a)(1), and accordingly entered judgment against petitioners for approximately $550,000. Pet. App. A32, A40, A43; Res. App. 1a. On appeal, the Eighth Circuit affirmed the District Court's rulings in all respects for which petitioners had sought review, including waiver of their laches defense. Pet. App. A4-8, A19.

REASONS FOR DENYING THE WRIT

Petitioners seek discretionary review by this Court of only one issue from the affirmance of the judgment below: whether petitioners waived their laches defense to respondents' withdrawal liability claim in respondents' collection action by petitioners' failure to request arbitration as mandated by § 1401(a)(1). This Court should deny certiorari in this case because (1) there is no conflict among the courts of appeal, (2) the narrow issue presented is not of the import warranting review, (3) the issue is premature for review, (4) the ruling below is accurate and fair, and (5) any other result would be burdensome to multiemployer pension plans and ultimately detrimental to the pension recipients ERISA was intended to protect.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THIS PRECISE ISSUE; THE CASES RELIED ON BY PETITIONERS ARE DISTINGUISHABLE.

Petitioners are correct in their statement that § 1399 (b)(1) mandates that a multiemployer plan "must notify an employer of withdrawal liability 'as soon as practicable' after the employer's withdrawal from the plan." Pet. 9. Petitioners neglect, however, to remind the Court that ERISA also provides that an employer may request review by the plan of the withdrawal liability assessment, and to the extent a dispute "concerning a determination made under *sections 1381 through 1399*" of ERISA exists "*shall*" arbitrate such dispute, or the assessed withdrawal liability becomes "*due and owing*" in a subsequent action by the plan trustees to collect thereon. *See* §§ 1399(b)(2)(A), 1401(a)(1) and 1401(b)(1), respectively (emphasis added). Not only is it the mandatory, rather than permissive, language of these statutes, but also the reading of these statutes in *pari materia* which has led appellate courts faced with a withdrawal liability collection action where no arbitration has been requested by an employer to conclude that waiver of defenses is applicable. *See Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056-57 (7th Cir. 1988); *Teamsters Pension Trust Fund v. Allyn Transportation Co.*, 832 F.2d 502, 504-506 (9th Cir. 1987); *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987).

The cases cited by petitioners in support of a so-called "split" in the circuits might be persuasive, except for the fact that the issue before this court is not whether waiver applies to all defenses raised by an employer, or whether waiver should apply in every procedural circumstance in which an employer and plan find themselves before the court. Rather, the issue before this Court is limited to *only* whether waiver should apply to an employer's *laches*

defense in a *plan trustee's collection action* where the *employer has failed to request arbitration*, or in any other respects to affirmatively and timely seek relief from the assessed withdrawal liability. Therefore, the cases cited by petitioners, which deal with other than the laches defense or which deal with a different procedural posture than a collection action on failure to arbitrate, do not present the conflicting decisions among the circuit courts of appeal which petitioners claim warrant exercise of this Court's discretionary review. See *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578, 581 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966 (1988) (no laches defense at issue; case began as declaratory judgment action by employer partnership filed before time for invoking arbitration had expired); *Mason & Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 852 F.2d 156, 161 (6th Cir. 1988) (no laches defense at issue; case originally arose via control group members' action in district court for injunctive relief after notice and assessment of withdrawal liability); *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897, 897-99, 903 (3rd Cir. 1986) (no laches defense at issue; employer filed declaratory judgment action after notice and assessment of withdrawal liability; court emphasized that this was a "rare case" with "unusual circumstances" in which the bypass of arbitration would be allowed); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1207-10 (D.C. Cir. 1984) (no laches defense at issue; company had requested arbitration, but refused to make accelerated payment of entire amount of withdrawal liability demanded by plan pending arbitration, triggering plan's suit to require such payment).

Even the only "laches" case cited by petitioners does not address the precise issue before this Court, and therefore cannot legitimately be cited as in direct conflict with the ruling of the Eighth Circuit in this case. In *In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990), *cert. de-*

nied, 111 S. Ct. 145 (1990), the issue was not whether the pension plan trustees had delayed in their provision of notice of and demand for withdrawal liability to the detriment of the employer, as is asserted here by petitioners, but whether the pension plan trustees in *Centric* had *brought their collection action* so late as to prejudice the employer. Pet. App. A8. Petitioners are well aware of the real thrust of the Tenth Circuit case, quoting directly therefrom in their Petition at page 13:

> "Laches in the *prosecution of an action to collect the amount assessed* is not such a defense [which is waived by failing to arbitrate], for *it goes to the effect of a delay in bringing suit*, not to the merits of the claim."

Centric, 901 F.2d at 1518 (emphasis added). Thus, the Tenth Circuit's decision is no more a basis for grant of a writ of certiorari in this case, than the former answers whether or not an alleged failure to notify an employer of withdrawal liability "as soon as practicable" pursuant to 29 U.S.C. § 1399(b)(1) is a defense that "go[es] to the merits of the liability assessment itself" and therefore subject first to arbitration, *Centric*, 901 F.2d at 1518, or whether the Tenth Circuit's decision would have been the same under the different circumstances here where the "as soon as practicable" laches defense *could* have been brought before the arbitrator. See *id.* at 1518 ("[A] failure to arbitrate does not waive a defense that the employer does not yet have. . . . At the time the Trustees argue Centric should have initiated arbitration, the delay giving rise to the laches defense had not yet occurred.").

In *Robbins v. Chipman Trucking, Inc.*, 693 F. Supp. 628 (N.D. Ill. 1986), *aff'd*, 866 F.2d 899 (7th Cir. 1988), after an extensive analysis of withdrawal liability cases in the various circuits, Chief Judge Grady concluded that most of the cases in which an employer was allowed to contest withdrawal liability in federal court without first

going to arbitration were capable of categorization into one of three different types of cases. So, too, the cases cited by petitioners are distinguishable from the case before this Court and thus do not warrant the Court's exercise of discretionary review to consider a very distinct issue as to which there is yet to appear a direct conflict in the appellate courts.

II. THE NARROW ISSUE PRESENTED IS NOT OF THE IMPORT WHICH WARRANTS EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION.

Not only are there no circuit courts of appeal decisions in direct conflict with the Eighth Circuit's decision below, but the precise legal issue raised by the Petition is rare indeed. The Eighth Circuit could only find one case sporting the same issue. Notably, that court held that a laches defense based on § 1399(b)(1)'s "as soon as practicable" was waived if not arbitrated. *See ILGWU Nat'l Retirement Fund v. Smart Modes of California, Inc.*, 735 F. Supp. 103, 106-107 (S.D.N.Y. 1990). *See also Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1127 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989). Pet. App. A8.

Moreover, the facts of this case are also unique They involve a stock sale of the contributing employer, a refusal to honor a picket line, contract expiration and bankruptcy. See *supra* pp. 3-4. Various allegations by petitioners of peculiar damage exist as well, to wit, a settlement release and loss of corporate documents. Pet. 6-7. The uniqueness of the legal issue in this case is only equalled by the complexity of the factual setting in which it arises. The Court's first pronouncement regarding the "arbitration/waiver" issue as it applies to ERISA withdrawal liability might best be reserved for a case having a more universally applicable set of facts and issues to be addressed.

III. THIS ISSUE IS PREMATURE FOR REVIEW; DISCRETIONARY REVIEW SHOULD BE DEFERRED FOR FURTHER LOWER COURT DEVELOPMENTS REGARDING THIS ISSUE AND WAIVER IN GENERAL.

Given the few number of district and appellate courts which have had the opportunity to render an opinion on the issue presented by the Petition, the issue is premature for this Court's discretionary review. Such consideration should be deferred until other courts have addressed same.

Furthermore, the more general "waiver/arbitration" issue continues to receive its share of attention and refinement in the lower courts. Even those circuits whose cases petitioners have cited in support of their position have often found it necessary at a later date to explain and narrow the impact of their prior rulings. *See, e.g., Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1255 (3rd Cir. 1987) (which, as the District Court below noted at Pet. App. A26, emphasizes the extreme narrowness of *Dorn's Transp.* and concludes that the mandate of section 1401(a)(1) does not permit an employer to avoid arbitration by merely stylizing an issue as one of pure statutory interpretation). The Eighth Circuit, as well as other appeals courts who have not had an opportunity to address the waiver issue "head on", so to speak, should have an opportunity to do so, or to embellish upon the narrow issues that have been addressed as the occasion permits until this issue is ripe for Supreme Court review.

IV. THE RESULT BELOW IS ACCURATE AND FAIR, THEREBY MAKING EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION UNWARRANTED.

If all else pointed to the Court's grant of a writ of certiorari in this case, which it does not, the accuracy and fairness of the result below would still militate

against such an exercise of jurisdiction. Petitioners' loose reference to their laches defense based on respondents' alleged untimely notice of withdrawal liability (Pet. App. A34) as a question of statutory interpretation (Pet. i) works to no avail. The Eighth Circuit accurately characterized that defense as raising essentially factual issues and one which rightly should have been deemed waived if not resolved first in arbitration. Pet. App. A8. *See also Retirement Fund of Fur Mfg. Ind. v. Getto & Getto, Inc.*, 714 F. Supp. 651 (S.D.N.Y. 1989); *Central States Southeast and Southwest Areas Pension Fund v. MGS Transportation, Inc.*, 661 F. Supp. 54 (N.D. Ill. 1987); *In re Korman Corp. and Teamsters Pension Fund of Philadelphia*, 10 EBC 1608 (Pereles, Arb., Aug. 15, 1988).

From a fairness standpoint, the Eighth Circuit's affirmance of the District Court's application of waiver to petitioners' laches defense equally supports no certiorari review in this case. Unlike in the *Centric* case, the laches defense asserted by petitioners here could have been raised in arbitration. Furthermore, despite petitioners' attempts to blame the so-called untimely withdrawal liability notice of respondents for everything from a settlement release to loss of corporate documents, the fact still remains that, had petitioners exercised their right and obligation under ERISA to arbitrate this dispute, their laches defense would not have been waived. Whatever may be attributable to respondents, justifiably or not, the waiver of petitioners' defense is not one of them. The loss of that defense rests squarely on petitioners' shoulders, where it should stay.

V. ANY OTHER RESULT WOULD LEAD TO CONFUSION, CHAOS AND UNNEEDED EXPENSE FOR ALREADY FINANCIALLY BURDENED MULTIEMPLOYER PENSION PLANS TO THE ULTIMATE DETRIMENT OF THE PENSION RECIPIENTS ERISA WAS INTENDED TO PROTECT.

The purpose of ERISA is to secure that employees receive their vested benefits from private pension plans. *Central States Southeast and Southwest Areas Pension Fund v. Sztanyo Trust*, 693 F. Supp. 531, 537 (E.D. Mich. 1988). *See also ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 880 (2nd Cir. 1988). ERISA's intentions are to be liberally construed to provide maximum protection to employees. *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 731 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

The Multiemployer Pension Plan Amendments Act to ERISA is a statutory scheme which has at its heart the "provision[] for informal, *expeditious* resolution of withdrawal liability disputes." *Clinton Engines*, 825 F.2d at 416 (emphasis added). It was molded with precision to provide ample opportunity to an employer to resolve any disputed withdrawal liability without compromising the purposes for which such liability was created in the first place—to shore up the financially burdened multiemployer pension plans responsible for providing retirement benefits to many of the nation's workers. *See id.*

In so doing, Congress mandated arbitration of withdrawal liability disputes. § 1401(a)(1). Furthermore, its

> intent to minimize delay in multiemployer pension plans' receiving payment is perhaps clearest in 29 U.S.C. § 1399(c)(2), which requires employers to make interim payments pending arbitration. . . . This intent—also apparent in the legislative history—has led courts to characterize the MPPAA as a "pay-first-question-later" statute.

Clinton Engines, 825 F.2d at 426-27 (footnote and citations omitted).

Finally, Congress also intended that at some point, multiemployer pension plans were to be able to act in reliance that whatever dispute might have been raised had been foreclosed. Then, attention could be turned exclusively to collection of the withdrawal liability payment "due and owing", rather than to continued debate over the legitimacy of the claim. § 1401(b)(1).

Despite the above-referenced, precisely crafted mechanisms for efficient and expeditious resolution of withdrawal liability disputes contemplated and put into place by Congress, this case is a perfect example of how a statutory scheme, despite its best intentions, can go awry. Five years since filing of the respondent pension plan trustees' § 1401(b)(1) *collection action* against petitioners (Pet. App. A4), $249,652.00 of unpaid withdrawal liability later (Pet. App. A43-44; Ae. App. 34), and an almost equal amount of statutory attorneys' fees, expenses, interest and double interest later, petitioners have argued and re-argued before every court to which they could get an audience, by right or discretion, a factual issue which should and could have been brought before the arbitrator and resolved at the outset of this dispute.

A different result in this case could only lead to a quagmire of confusion and chaos regarding what issues must, or do not have to, be resolved in arbitration of withdrawal liability disputes, particularly juxtaposed against a statutory backdrop which in no uncertain terms mandates the arbitration of *any* dispute concerning withdrawal liability. Even more egregious is the expense and delay to which multiemployer pension plans will be put in having to address these disputes in any or multiple forums as the employer purposely puts every obstacle available in the path of the payment of the assessed withdrawal liability.

Ultimately, of course, the loser is the intended winner —the pension recipient. A statute enacted to strengthen the financial integrity of pension plans, so that employees may be assured of receiving their pensions, will have been turned on its head. The real winner will be the party who began this end run around the statute in the first place.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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